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Error to Circuit Court of City of Newport News.

Bill by Frank W. Darling against the City of Newport News. Demurrers to the original and amended bills sustained, and both bills dismissed, from which plaintiff brings error. Affirmed.

Jones & Woodward, of Hampton, and *J. Winston Read*, of Newport News, for plaintiff in error.

J. A. Massie, of Newport News, for defendant in error.

HUNTER *v.* BURROUGHS.

June 13, 1918.

[96 S. E. 360.]

1. Physicians and Surgeons (§ 18 (4)*)—Declaration—Sufficiency.

—In an action for malpractice in the diagnosis of eczema treatment with X-rays and salves, a count alleging that defendant did not possess and apply reasonably sufficient knowledge and experience, care, and skill to anticipate and foresee the probable effect which the application of the X-ray treatment, as used by him upon plaintiff's legs and ankles, would produce, and to apply reasonably proper and appropriate prescriptions, medicines, and remedies thereto, after using the same, in order to prevent them from being burned and the flesh and skin, to which said X-ray was so applied, from being destroyed, and in order to prevent ulcers, sores, and other injuries from resulting therefrom, but, on the contrary, by reason thereof did fail to reasonably anticipate and foresee the probable effect which said treatment would produce, and by reason thereof did fail to apply reasonably proper and appropriate medicines, preventatives and remedies thereto, after the same had been used and employed by him, to prevent the skin and flesh to which said X-ray treatment was applied from being destroyed, and to prevent ulcers, sores, and other injuries resulting therefrom, was sufficient on demurrer.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

2. Pleading (§ 41*)—Sufficiency in General.—A declaration which informs defendant of the nature and character of the demand against him and states such facts as will enable the court to say, if the facts are proven as alleged, whether they establish a good cause of action, is sufficient on demurrer.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 217, 239.]

3. Pleading (§ 11*)—Statement of Details.—Allegations which descend into statements of details of proof are unnecessary.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 218.]

4. Pleading (§ 315*)—Bill of Particulars.—If a declaration give defendant partial, but not complete, notice of the nature and character of plaintiff's claim, a bill of particulars may be required.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 377.]

5. Physicians and Surgeons (§ 18 (4)*)—Malpractice—Pleading.—In an action for malpractice, whether this or that specific prescription, medicine, or remedy should have been applied or not applied is a matter to be proven by expert evidence upon issue of unskillfulness and negligence, and need not be alleged in declaration, since a layman cannot have the knowledge of what specific prescription, etc., should have been applied.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

6. Physicians and Surgeons (§ 18 (4)*)—Malpractice—Pleading.—In action for malpractice, a count, alleging among other things that defendant prescribed wholly improper and hurtful medicine and so-called remedies, "being two certain salves which were prescribed by and are known to him," was not demurrable because of quoted portion, since, as a pleading of matters of evidence, it could be regarded as surplusage, and, as an allegation of fact, it sufficed to inform defendant of the nature and character of the salves, since it alleged they were prescribed by and were known to him.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

7. Appeal and Error (§ 193 (1)*)—Rulings on Demurrer—Review.—Although the objections to certain counts made in assignments of error do not appear from the record to have been made in the court below by being specifically stated in the grounds of demurrer, where it does not appear from the record that any motion was there made by plaintiff to require, or that the court on its own motion required, the grounds of demurrer relied on to be stated pursuant to Code 1904, § 3271, and no objection is made by plaintiff to the consideration of the assignments of error as to such counts, assignments will be considered.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 552.]

8. Physicians and Surgeons (§ 18 (4)*)—Malpractice—Pleading.—Count charging that defendant physician was negligent in subjecting plaintiff to X-ray treatment without making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays was not demurrable because it did not contain express allegation that other specialists would not have been guilty of such omission; for, although the proper standard by which defendant's duty was to be determined was what other specialists would have done in similar circumstances, the allegation of such standard of duty was implied in the pleading, and failure to expressly allege it did not deprive defendant of his right to require the same character of proof, by expert testimony as to his failure to conform to the standard, as if it had been expressly alleged.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

9. Physicians and Surgeons (§ 18 (4)*)—Malpractice—Pleading.—Count alleging failure of defendant physician to make such test or

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

examination before subjecting plaintiff to X-ray treatment, as in the exercise of ordinary care it was his duty to make under the circumstances alleged, was sufficient to raise issue whether defendant was professionally unskillful and negligent in the matter, and was not demurrable because not alleging in detail what test and examination should have been made before the application of the X-ray; the details as to whether this or that particular test and examination should have been made being matters of evidence.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

10. Physicians and Surgeons (§ 18 (4)*)—Malpractice—Pleading.—Count charging that defendant physician was negligent in subjecting plaintiff to X-ray treatment without making preliminary examination to determine plaintiff's susceptibility to influence of X-ray was demurrable, where it failed to allege, except inferentially, that plaintiff was more susceptible than other persons, and that if alleged tests had been made it would have resulted in discovery of such susceptibility.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

11. Appeal and Error (§ 1040 (10)*)—Overruling Demurrer—Harmless Error.—Although a count was demurrable for failure to allege the existence of any peculiar susceptibility of plaintiff to X-ray treatment, where there was no evidence of such susceptibility, and the verdict was necessarily based on other counts, error in overruling demurrer was harmless.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 587.]

12. Physicians and Surgeons (§ 15*)—Possible Bad Consequences—Duty to Warn.—Failure of physician to warn a patient of the danger of possible bad consequences of using a remedy is not negligence per se.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 204.]

13. Physicians and Surgeons (§ 15*)—Possible Evil Consequences—Liability.—Where a physician not only fails to warn of dangers of a certain treatment, but gives positive assurance of a cure thereby, he is liable for harmful consequences of the treatment, where, if such warning had been given, the patient would not have taken the treatment.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 204.]

14. Physicians and Surgeons (§ 18 (1)*)—Actions—Tort.—A count alleging that plaintiff consulted defendant as a physician regarding eczema and as to the proper treatment thereof, that defendant well knew, or by the exercise of ordinary skill and forethought should have known, of the danger of such treatment, that notwithstanding defendant misled plaintiff by not only not giving him warning as to the possible bad consequences, but by affirma-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

tively assuring him that if defendant applied the X-ray treatment to plaintiff's legs and ankles his eczema would be cured and his legs would be well in eight weeks, and that, had defendant given plaintiff warning aforesaid, the latter would not have submitted to the treatment, was in tort, and could be united in the action with other counts in tort.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

15. Physicians and Surgeons (§ 18 (7)*)—Bad Results—Liability.—In addition to expert testimony in behalf of both plaintiff and defendant on the question of what was the standard of professional skill and care by which the competency and conduct of defendant physician in giving X-ray treatment should be measured, the result of the treatment was properly to be considered by the jury.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

16. Appeal and Error (§ 867 (1)*)—Review—Motion for New Trial.—In reviewing assignment that trial court erred in refusing to set aside verdict and grant new trial, no attempt will be made to reconcile conflicting evidence; inquiry being limited to question whether record discloses sufficient evidence of probative value to support verdict.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 577.]

17. Physicians and Surgeons (§ 18 (8)*)—Standards—Expert Testimony.—Since the standards of professional care and skill of defendant physician involved the highly specialized art of treatment of plaintiff by X-rays, expert testimony fixing such standards was essential to support a verdict for plaintiff.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

18. Physicians and Surgeons (§ 18 (8)*)—Negligent Operation of X-Ray—Evidence.—Evidence held to support conclusion of jury that defendant physician in giving plaintiff X-ray treatment did not use proper professional care and skill in the mechanical operation of the X-ray apparatus.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

19. Physicians and Surgeons (§ 18 (8)*)—Malpractice—Sufficiency of Evidence.—In action for malpractice plaintiff was not required to exclude, by his proof, the possibility of the result complained of having been due to causes for which defendant physician was not responsible, and proof which showed that the bad result was more probably due to lack of skill or negligence of defendant was sufficient.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

20. Negligence (§ 121 (5)*)—Evidence.—Where the proof leaves it equally probable that bad result complained of may have been due to a cause or causes for which defendant physician is not re-

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sponsible as to a cause or causes for which he is responsible, the plaintiff cannot recover.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 411; 11 Va.-W. Va. 205.]

21. Evidence (§ 538*)—Experts—Competency.—A general practitioner of exceptionally high standing in the profession, who had used the X-ray to take photographs, had had personal experience and knowledge of ulcers caused by X-rays, and from his professional training and reading of scientific books had a certain degree of knowledge on the subject of the proper curative use of X-rays, was competent to testify as to general professional standard of skill and care required in giving X-ray treatments, although he had never used the X-ray curatively.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 780.]

22. Appeal and Error (§ 1002*)—Jury Finding—Conclusiveness.—The jury by their verdict having found upon conflicting evidence that plaintiff's injury was caused by X-rays, the finding is conclusive.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 620.]

23. Physicians and Surgeons (§ 18 (8)*) — Malpractice—Sufficiency of Evidence.—In an action for malpractice consisting in diagnosis of eczema and treatment thereof with X-rays, evidence held sufficient to support verdict for plaintiff.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

24. Physicians and Surgeons (§ 18 (7)*)—Malpractice—Evidence—Admissibility.—Testimony of physician to the effect that advising and applying X-ray treatment for eczema for plaintiff's legs and ankles in the condition they were at the time was malpractice was admissible on issue whether X-rays were properly applied, since it does not follow that, because testimony exceeds in its effect what it is incumbent on the party introducing it to prove, it is inadmissible or does not tend to prove a lesser issue of fact.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 205.]

Error to Law and Chancery Court of City of Norfolk.

Action by Benjamin B. Burroughs against James W. Hunter, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

Loyall, Taylor & White and *Thos. H. Willcox*, all of Norfolk, for plaintiff in error.

Jeffries & Jeffries and *Tazewell Taylor*, all of Norfolk, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.